IN THE SUPREME COURT OF THE UNITED STATES

DETROIT UNITED RAILWAY, a corporation, Plaintiff in Error, vs. CITY OF DETROIT, a Michigan corporation, Defendant.	October Term 1920. No. 492.

MOTION TO ADVANCE OR FOR INJUNCTION PENDING HEARING

Now comes the Plaintiff in Error in the above entitled cause, by Elliott G. Stevenson, its attorney, and moves the Court that an order be entered herein advancing said cause for hearing on the docket of said Court for the October Term, 1920, at an early day, for the following reasons:

1. The plaintiff will suffer irreparable injury and damage if said case may not be heard and disposed of at an early date.

2. The defendant has already sold upwards of a million and a half dollars, face value, of the bonds for the issue of which plaintiff alleges there is no valid authority, and

has entered into contracts involving an expenditure of the proceeds of such bonds, and is preparing to enter into other large contracts involving in the aggregate large amounts to be paid out of the proceeds of such bonds, all of which, in the hands of bona fide purchasers, would probably be held to be valid obligations of the defendant municipality, notwithstanding the alleged invalidity of the proceedings purported to authorize their issue.

3. The action of the Court below in disposing of said cause was special and peculiar.

In case the foregoing Motion shall not be granted, said appellant moves the Court to grant its Writ of Injunction to restrain the defendant from issuing or disposing of further bonds under the proceedings set out in plaintiff's Bill of Complaint, as prayed for in said Bill of Complaint, pending the hearing and determination of this cause in this Court, for the following reasons:

(a) The defendant municipal corporation has issued under the authority alleged by plaintiff in error to be invalid, bonds exceeding in amount One million five hundred thousand dollars ($1,500,000).

(b) The defendant municipal corporation intends to issue further large amounts of such bonds and to use the proceeds thereof in carrying out the plans for the construction of a municipal street railway system within the City of Detroit.

(c) The defendant municipal corporation has entered into contracts involving obligations exceeding One million

five hundred thousand dollars ($1,500,000) and intends to proceed to let other contracts involving larger sums of money and to issue further bonds out of the proceeds of the sale of which they purpose paying the obligations incurred under such contracts.

(d) Because the defendant municipal corporation has incorporated recitals in such bonds that will probably make the same valid obligations of the City in the hands of bona fide purchasers.

(e) Because the proceedings under which the said bonds are issued are invalid and afford no legal warrant or authority for the issue thereof.

This Motion is based upon the Bill of Complaint filed herein and the affidavit of A. D. B. Vanzandt, Publicity Agent of Plaintiff in Error, a copy of which is hereto attached and marked Exhibit "A."

Elliott G. Stevenson,
Attorney for Plaintiff in Error.

John C. Donnelly,
William L. Carpenter,
P. J. M. Hally,
H. E. Spalding,
Of Counsel.

BRIEF STATEMENT OF MATTER INVOLVED

Plaintiff filed its Bill of Complaint in the District Court of the United States for the Eastern District of Michigan, Southern Division, to have an ordinance adopted by the Common Council of the City of Detroit, under date January 27, 1920, declared void and to prevent its enforcement, and to that end prayed for a temporary injunction restraining the issue of bonds purporting to be authorized under the terms of such ordinance and the vote of the electors had thereon on April 5, 1920. The Bill of Complaint was filed April 10, 1920.

After the filing of the Bill of Complaint with the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division, and the service of process upon the defendant named therein, defendant, by its counsel, filed in said Court a motion to dismiss said Bill of Complaint for reasons assigned in such motion, and said motion came on to be heard before Honorable Arthur J. Tuttle, Judge of the District Court for the Eastern District of Michigan, on the ninth day of July, 1920.

Upon the argument of said motion to dismiss on said date, the said District Judge forthwith granted said motion to dismiss, and a decree of dismissal was, accordingly, entered, from which an appeal was taken to this Court.

The plaintiff alleges in its Bill of Complaint that it is the owner of the entire street railway system operated in the City of Detroit, affording transportation facilities for the people of the City of Detroit and for interurban traffic over interurban lines to and from the business center of the City of Detroit with many of the principal cities and towns in Eastern and Southern Michigan and with the cities of Toledo and Cleveland in the State of Ohio, and that the plaintiff is a taxpayer of the City of Detroit and has property therein assessed for and subject to taxation of the assessed value of upwards of $25,000,000.

That the City of Detroit, through its Mayor and Common Council, proposed, by ordinance for submission to the people, a scheme or plan to construct a municipal street railway system within the City of Detroit and through two other municipalities—Highland Park and Hamtramck—lying within the boundaries of the City of Detroit. This plan involved taking over by the City certain lines of street railway owned and operated by the plaintiff Company, which would constitute the trackage and transportation facilities without which the proposed municipal system would be of no practical value. These lines for the most part consisted of Woodward Avenue, from Milwaukee Avenue South to the Detroit River, the so-called Fort Street Line, from Artillery Avenue on the West, to Jefferson Avenue at its intersection with Helen Avenue on the East, embracing thirty-three miles of street railway tracks and about thirty miles of trackage constructed by the plaintiff Company under what is ordinarily referred to as the "Day to Day Agreements." The proposition referred to was submitted to a vote of the electors held on April 5, 1920, and was approved by the necessary vote of such electors.

The attack made by the plaintiff on these proceedings was based upon three grounds:

First: That while the proposition submitted to the electors for their consideration was officially represented to be a proposition to take over that portion of the lines owned by the plaintiff Company referred to, *by purchase*, the ordinance did not authorize the City to take the same over by purchase, but involved simply a proposition to *construct* a new system of street railway, and this necessarily involved the tearing up and destruction of the tracks of the plaintiff company upon the lines referred to; and that while the ordinance provided only for such construction, the purpose and intent of the Mayor and Common Council of the City of Detroit, in proposing the submission of such question to the people, was not to exercise such power to construct, but only to use the same as a measure of coercion to compel the plaintiff Company to sell its property on the streets referred to at a wholly inadequate price, and they thereby undertook to take the plaintiff's property without due process of law in violation of the due process provision of the Fourteenth Amendment to the Federal Constitution.

Second: That the ordinance adopted by the Common Council under which only the City could act, provided for the *construction* of new tracks and equipment on and over the streets referred to then lawfully occupied by the plaintiff Company for street railway purposes; nevertheless, the Mayor and Common Council and other officers of the City of Detroit, in order to obtain the approval of such plan by the electors of the City, officially represented to such electors that the plan was not to force the removal or destruction of plaintiff's tracks and thereby deprive the public for a long period of the facilities provided by the same, but that such plan was to take over by purchase such lines

so that such transportation facilities imperatively required for the service of the people would not be disturbed, and that such misrepresentation, involving a matter vital to the electors in voting on such proposition and, as alleged in plaintiff's Bill of Complaint, influenced the vote of seventy-five per cent. of those voting for the proposition, invalidated the vote by which it was approved by the people and rendered the same entirely nugatory.

Third: That the Mayor and Common Council of the City officially represented to the electors, to influence their action in voting upon such proposition, that the $15,000,000 of bonds proposed to be issued under the provisions of such ordinance would defray the cost in full of the complete construction and installation of such new municipal street railway system, well knowing that the amount of such bonds was wholly inadequate to provide for the same, and that it could not build such complete system—for the reason that it had no right to construct an important part of the same through other municipalities—Hamtramck and Highland Park—as it had not and could not secure right to construct a street railway system through the same.

The motion of defendant's counsel to dismiss alleged that the court below was without jurisdiction on the ground that no federal question was presented by the allegations of plaintiff's Bill of Complaint, and further, that the allegations of such Bill constituted no ground for equitable relief.

WITH REFERENCE TO THE QUESTION OF JURISDICTION:

Inasmuch as the learned District Judge, in disposing of the motion made by the defendant to dismiss plaintiff's Bill of Complaint, held that the plaintiff's Bill of Complaint presented Federal questions conferring jurisdiction, we do not deem it necessary upon this motion to discuss this matter at any considerable length. We submit that the finding of the District Court upon this question is sufficient to warrant counsel in assuming that this Court will treat such finding as sufficient upon which to base the motion we have made.

At the outset of his opinion (R. p. 57), the District Judge said:

> "As I view it, the most difficult question that has been submitted to the Court is the one as to whether or not a Federal constitutional question is involved in the so-called Detroit United Railway suit. (There were two suits under consideration, in one of which the Detroit United Railway is plaintiff, and in the other, the New York Trust Company is plaintiff). In the light of the recent decisions, I reach the conclusion that it is my duty to take jurisdiction of that case and I do so upon the theory that the Federal question is raised in good faith and not because when such question is properly answered, the bill shows any invasion of constitutional rights."

But we will very briefly discuss this question of jurisdiction.

The Court will readily recognize the rule laid down in *City Railway Co.* v. *Citizens Railway Co.*, 166 U. S. 563,

wherein Mr. Justice Brown, speaking for the Court, said:

> "All that is necessary to establish the jurisdiction of the Court is to show that the complainant had, *or claimed in good faith to have,* a contract with the city, which the latter had attempted to impair. * * *
>
> (P. 564) "Whether the State had or had not impaired the obligation of this contract was not a question which could properly be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect and such claim was apparently made in good faith and was not a frivolous one."

Plaintiff's bill of complaint alleged that it had actual rights in the streets, acquired by the approval and action of the defendant municipality, *after* the expiration by limitation of the franchises that had theretofore been granted plaintiff company, or its assignors, and after the decisions of the Michigan Supreme Court, 172 Mich., p. 136, and of this Court, 229 U. S., p. 39.

It further alleged that the Mayor and Common Council, the executive and legislative departments of the municipal government, had decided upon a policy of forcing the plaintiff, without having its rights passed upon judicially, to submit to having its property destroyed by removal, and this not for the purpose of in good faith attempting to have restored to it control of the streets, but for the unlawful purpose of coercing the plaintiff into disposing of its property to the City at an inadequate and unfair price.

It is a universally recognized rule of law that it is unlawful for persons to combine to take or obtain property of another, either by the exercise of unlawful means or the

exercise of lawful means in an unlawful way. So that even if it were conceded that plaintiff had no rights in the streets referred to and that the defendant had a lawful right to resume control of the streets, it could not exercise such lawful right by the unlawful means adopted of making a pretence of exercising such rights for the sole purpose of coercing the plaintiff to sell its property at an inadequate price.

The plaintiff company was in lawful occupancy of the streets referred to so far as the use thereof for operating a street railway system was concerned, even if it were only a tenant by sufferance. The City possessed the power but not the right, through its police and public works departments, to tear up plaintiff's tracks and destroy its property and it sought the legislation referred to by enacting the ordinance complained of, to place itself in a position to exercise its power without having the rights of the plaintiff Company judicially determined, and for the sole purpose of enabling it to coerce the plaintiff to sell its property at an inadequate and unfair price.

The specific allegation relating to this matter is found in the concluding portion of paragraph (16) of plaintiff's bill of complaint as follows:

> "It is the intention of said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid, without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same, and there-

> by deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th Amendment of the Constitution of the United States."

Such means, we submit, constitutes an attempt to take plaintiff's property without due process of law and is an attempt to impair its contract rights even though such rights were only established by an implied contract resulting from acquiesence, approval and direction of the defendant municipal corporation with reference to the reconstruction of its entire tracks and overhead equipment, etc., on Fort Street after the expiration of its franchise grant by limitation and after the court decisions referred to.

See *Cincinnati* v. *Traction Co.*, 245 U. S. 446.

The allegations of plaintiff's Bill of Complaint with reference to the question of jurisdiction as to the phase of the matter just discussed, are similar to the allegations contained in plaintiff's bill of complaint in the case of

Cuyahoga Power Co. v. *Akron*,
240 U. S., 462.

In the latter case it was averred that the city had no constitutional power to take the plaintiff's property for a water supply, and averred that the city did not intend to institute proceedings against the plaintiff, but intended to take its property and rights without compensation, *and that the purpose of the city ordinance and certain statutes referred to is to appropriate the plaintiff's rights without compensation.* Mr. Justice Holmes, speaking for the Court in deciding that case, said:

> "Whether the plaintiff had any rights that the city was bound to respect can be decided only by taking jurisdiction of the case."

Plaintiff's bill further alleges that by the conduct and action of the defendant municipality, plaintiff company had acquired new rights after the decisions of the Supreme Court of Michigan and the Supreme Court of the United States in the Fort Street case referred to. These new rights were based in part upon the fact that after the city under the decree of the Supreme Court of Michigan, affirmed by the Supreme Court of the United States, had the right to oust the railway company from the use of Fort street, instead of exercising this right it, in recognition of the imperative need of the public of the City of Detroit to have the use of the plaintiff's transportation facilities on that street, authorized the plaintiff Company to entirely reconstruct its tracks and overhead equipment thereon, involving an expenditure of $1,400,000, and also, after the affirmance of the decree of the Michigan Supreme Court referred to, authorized the plaintiff Company to partially reconstruct and better the tracks and facilities for serving the public of Detroit on Woodward Avenue, which involved an expenditure upon the part of the plaintiff Company of $800,000, and that a substantial part of such expenditures were directed by express resolutions of the Common Council.

The approval and authorization by the City to the street railway company to reconstruct the tracks and make the expenditures referred to were had under the provisions of the charter of Detroit which required that before any work should be undertaken by the street railway company, or any other corporation or persons, in the streets of the city, it or they should obtain a permit from the Public Works Department of the city and upon the granting of such permit, the department referred to was required to appoint an inspector, representing the city, to see that the requirements of the city relating to the improvements to be made were complied with and the railway company

was required to pay the City the expense attending such inspector.

In pursuance of this provision of the charter of Detroit, plaintiff Company applied to the City, through its Public Works Department, for permission to reconstruct its track on Fort Street; likewise to make the betterments and improvements on Woodward Avenue. The permits were granted, the inspectors appointed, and the work under the supervision of the city representative was carried on to completion, and large sums of money were paid by the plaintiff Company to the City for the services of the inspector in making such supervision.

In addition to this, in 1918, the Common Council adopted an ordinance, approved by its Mayor, regulating and controlling the operation of plaintiff Company's entire street railway system within the City of Detroit. This ordinance was under consideration by this court in the case of Detroit United Railway against City of Detroit, 248 U. S., 429, in which case this Court held that the adoption of this ordinance in and of itself operated as a grant of new rights during its term.

Again, in 1919, owing to a strike of the employes of the railway company, growing out of a demand for increased compensation and the claim of the railway company as to the necessity for increased rates of fare to meet the demand made, the city filed a bill of complaint in the Circuit Court for the County of Wayne, in Chancery, praying for a mandatory injunction requiring the plaintiff to resume the operation of its street railway system, or for the appointment of a receiver for such company that it might be operated through receivership. And this was based upon the allegation contained in plaintiff's bill of complaint to the effect "that by reason of the plaintiff company's cessation of the operation of its cars, it paralyzed

the industrial and commercial interests of the City of Detroit.

In the particulars referred to and in other innumerable ways, the city authorities, including its Mayor and Common Council, have recognized from time to time the imperative need of the public of Detroit of the continued service of the plaintiff Company's transportation facilities.

It is not necessary to argue on this preliminary motion the legal effect of the conduct of the city in the particulars referred to. It is sufficient for us to say that under the conditions stated, plaintiff Company had acquired new rights of a determinate or indeterminate character after the decision of the so-called Fort Street cases, and that the City was bound to respect these new rights and not to undertake to destroy them, as was proposed by the adoption of the ordinance referred to, without judicial determination of the rights of the parties in connection with the same.

A question practically identical to this was discussed and decided by the Supreme Court of Michigan, in

Ramsdell v. *Maxwell,* 32 Mich., 282.

The opinion was written by the late Justice Campbell, concurred in by the late Justices Cooley and Graves of that court. The case grew out of mortgage foreclosure sale which had reached the stage where decree of foreclosure was granted and sale under the decree made and confirmed. After this had taken place, by a new agreement between the parties, the mortgagor, still in possession, was granted the right to continue therein upon condition of the carrying out of the terms of the agreement they had entered into. It was subsequently claimed that the mortgagor, thus in possession, had failed to carry out the terms of the new agreement and an application was made to the court and a writ of assistance was granted to

oust the mortgagor and deliver possession of the mortgaged property to the purchaser at the sale. The Court said: (p. 287)

> "A writ of assistance is the regular process for carrying out a decree of possession, and lies on foreclosure sales. Its object is to compel parties who are bound up by a decree to give up the possession which by the decree and sale under it they have become estopped from further asserting, and when they have thus become tenants at sufferance. But it cannot be used to enforce any but such rights.
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> "Where a tenant at sufferance is allowed to continue in possession under a new arrangement, he ceases to be a tenant at sufferance and becomes a tenant at will, and must be so dealt with.
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> "But we do not see how a writ of assistance can be proper where there is any real controversy as to the right of possession not precluded by the decree and sale. No one can be compelled to try a contract on affidavits, and it would be a violation of elementary principles to attempt it. If Ramsdell claims to be entitled to possession, the defendant is entitled nevertheless to dispute that claim and have it determined in some legal or equitable proceeding where there can be a hearing. *And as the contest arises under an agreement made subsequent to the decree, of course no rights under the new agreement were settled by the decree.*"

If the Court has acquired jurisdiction in the case, based upon the ground that the defendant's action and conduct was a violation of the plaintiff's rights protected by the provisions of the Federal Constitution, the court will consider not only the federal questions involved, but the local questions, namely, whether the legislation or proceedings taken by the municipality were valid or in-

valid and contravened the rights of the plaintiff Company as a tax payer.

This was so ruled by this Court in a number of cases, including,

Siler v. *Railroad Company*, 213 U. S 175

The bill in that case attacked the validity of a Kentucky statute creating a state railroad commission, as a violation of various provisions of the federal constitution, and also averred that an order of the commission making general schedule and maximum rates for certain railroads was invalid because unauthorized by the statute.

The Court said: (p. 191)

> "The federal questions as the invalidity of the state statute because, as alleged, it was in violation of the federal constitution, gave the Circuit Court jurisdiction, and having properly obtained it that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.
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> "This court has the same right, and can, if it deem it proper, decide the local questions only and omit to decide the federal questions, or decide them adversely to the party claiming their benefit. . . . . Of course the federal question must not be merely colorable, or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction."

The Court held the statute good but the order of the commission bad.

See also, *Ex Parte Young*, 209 U. S., 123
Home Telephone Co., v. *Los Angeles*
227 U. S., 278;
Louisville Railway Co. v. *Garrett*,
231 U. S., 298;
Cuyahoga Power Co. v. *Akron*,
240 U. S., 462;
Green v. *Railroad Co.*,
244 U. S., 499.
Cincinnati v. *Traction Co.*,
245, U. S., 446.
Columbus Railway Co. v. *Columbus*,
249 U. S., 299.

Counsel for the city in this case relied principally upon the cases of Barney v. City of New York, 193 U. S., 430, Memphis v. Telephone Co., 218 U. S., 624.

This Court, in commenting upon the Barney case in Home Telephone Co. v. Louisville, 227, U. S., 294, said:

> "As to the Barney case, it might suffice to say, as we have already pointed out, it was considered in the Raymond case and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of Ex Parte Young, it is now so distinguished or qualified as not to be here authoritative or even persuasive."

We submit that the District Judge was fully warranted in holding that the allegations of the plaintiff's bill of complaint made a case conferring jurisdiction in that it presented federal questions to be determined by that court.

WITH REFERENCE TO THE FIRST GROUND OF ATTACK STATED ABOVE (P. 6)

The Bill of Complaint alleged that it was proposed to construct lines of street railway on the portions of Woodward Avenue and Fort Street and the "Day-to-Day Agreement" lines above indicated. The taking of such lines would leave without any adequate connections that portion of the plaintiff Company's Woodward Avenue line north of Milwaukee Avenue, about thirteen miles in length, and that portion of the Fort Street line lying West of Artillery Avenue, about twelve miles, and a portion of the "Day-to-Day Agreement" lines, about twenty-six miles. That plaintiff's entire street car system within the City of Detroit embraced, approximated two hundred and ninety miles of trackage. That the business center of Detroit lies within a one mile circle, of which circle the center is the City Hall, situated at the corner of Fort Street and Woodward Avenue, and from this center the main thoroughfares of said City radiate, and a large part of the street railway traffic of the city, including interurban traffic, is necessarily through and to and from such center and that the only means of access to such business center in connection with such proposed municipal system would be provided over the tracks on Woodward Avenue and Fort Street proposed to be taken under said proposition.

It was further alleged in plaintiff's bill of complaint that while the representatives of the City in connection with said proposition claimed that the plaintiff Company's rights over said Fort Street East of Artillery Avenue and said Woodward Avenue South of Milwaukee Avenue had expired by limitation and that it was not operating under

any existing franchise or grant, and that the City had a right under the so-called "Day-to-Day Agreements" to take over by purchase such "Day-to-Day Agreement" lines, the said ordinance was not framed or proposed for the purpose of purchasing the plaintiff's lines on such streets —but was limited to *constructing* lines of street railway upon the same, and necessarily involved the removal and destruction of plaintiff's tracks, foundations, overhead equipment, etc., with the incidental interruption of all traffic during the period of such removal and the construction of new lines. . . (Rec. p. 15). That said ordinance was by the Mayor and his active associates wickedly conceived and cunningly devised with the view and for the purpose of setting at naught the rights of the plaintiff Company and it was the purpose of the Mayor of the City, assisted by his subservient associates and appointees, to take the property of the plaintiff, namely, the street car tracks and equipment now existing on the streets in said ordinance enumerated, for the use of the City of Detroit without paying the plaintiff fair and reasonable compensation therefor. That the method of accomplishing such dishonest and unlawful purpose as was openly and publicly and officially stated by the Mayor, and his associates, was to offer the plaintiff Company the sum of $40,000 per mile for each mile of track (including overhead equipment) so to be taken over, which sum as was well known to the Mayor and associates, is less than one-half of the fair value thereof, and that if such offer is not complied with, he and his associates will order said tracks removed from said streets; and that it was not proposed or intended by the Mayor to exercise the claimed power of ordering said tracks and equipment from said streets, because said railways are no longer required thereon for the public convenience, or any other reason or purpose, but the

claimed power is to be exercised only as a pretence for the accomplishment of said scheme of taking said property from the plaintiff for use as a street railway in its existing condition without paying fair and reasonable compensation therefor.

All of which was in violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

WITH REFERENCE TO THE SECOND GROUND OF ATTACK STATED ABOVE (P. 6)

Plaintiff's Bill of Complaint shows that the ordinance adopted by the Common Council, January 27, 1920, and subsequently submitted to a vote of the people on April 5, 1920, was submitted to it with a written official communication from the Mayor under date of January 6, 1920, the same being Exhibit 5 of plaintiff's Bill of Complaint.

The statement relating to the Fort Street and Woodward Avenue lines referred to therein is as follows:

> "The Class A system provides for the taking over of 34.25 miles of lines built under the so-called 'Day-to-Day Agreements,' in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about $40,000 per mile. Added to this, *we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver to us in preference to getting off the street, at say, an estimated cost of* $40,000 *per mile.*"

In the interim between the adoption of the ordinance referred to and April 5, 1920, the date fixed for the electors to vote upon the question of approving the proposition, the Street Railway Commission submitted a communication to the Common Council pointing out the necessity of giving to the electors accurate information as to what the proposition they were to vote upon involved, and asked the Common Council to appropriate the sum of $10,000 out of the tax collections of the city for the purpose of printing and distributing to all of the electors of the city a sample ballot informing them as to what was involved in such proposition. The request of the Board of Street Railway Commissioners was complied with and $10,000 was appropriated by the Common Council, with the approval of the Mayor, for the purpose stated, and, in the regular way provided by the charter, bids were called for to print the proposed sample ballots and information explaining the proposition to be voted upon.

In connection with and upon the back of the sample ballot was printed a map of the proposed lines of railway and showing the lines of the plaintiff Company so proposed to be taken over by purchase.

On the bottom of such sample ballot, in bold type, was the following:

> "This Official Information on the New Street Car Plan is Issued by B. of St. R. C. (Street Railway Commission) with Approval of Common Council."

and as a part of the same, the financial plan for constructing the proposed street railway system appeared as follows:

"FINANCIAL PLAN FOR "A" AND "B" LINES

Present trackage to be taken over at cost less depreciation as specified at the time company was given permission by city to build under a Day-to-Day agreement:

34.25 miles estimated at $40,000	$1,370,000.00
Fort and Woodward tracks where franchise has expired, 21.25 miles estimated at $40,000	850,000.00
New tracks in unserved districts, 100.75 miles estimated at $70,000	7,052,500.00
400 new electric motor cars estimated at $10,000 each	4,000,000.00
150 new trailers estimated at $5,000 each.... (If the Ford gas car is used, the cost of cars will be reduced about 50%)	750,000.00
Car barns, tools, etc	1,000,000.00
Total	$15,022,500.00

This $15,000,000.00 bond issue is for 30 years and will be paid by yearly installments through that period.

The Class "C" lines, consisting of 62 miles, will be developed as soon as "A" and "B" are in operation.

The $15,000,000.00 bond issue covers the building, equipping and where it is proposed, the taking over, of a total of 156 miles of the complete system of 218 miles."

From the sample ballot so printed and distributed to the electors of the city before the election of April 5, 1920, and from the official ballot actually used was omitted the

following part of sub-section 30 of Section 1 of the proposed ordinance:

> "and said Board of Street Railway Commissioners shall construct, own, maintain and operate in said City of Detroit . . .a system of street railways," etc.

In other portions of the ordinance the authority to be granted by a vote of the people was stated to be authority "to acquire, own, maintain and operate a street railway system," etc.

Of course, the property to be taken over by the city could be acquired by several means, namely, by construction, purchase, by lease or by condemnation, and the only mandatory provision of the ordinance as to the method to be employed was that omitted from the sample ballot referred to and under the provisions of the charter of the city no property could lawfully be purchased for street railway purposes—until a contract therefor had been negotiated and entered into and this contract submitted to and approved by vote of the electors.

The Corporation Counsel of the City of Detroit, who framed the ordinance and was actively associated with the Mayor and Common Council in submitting the proposition, publicly made the following statement:

> "Omission of a contract to purchase the 34.25 miles of D. U. R. 'day-to-day agreement' lines from the Couzens street car plan was not all oversight, Corporation Counsel Wilcox said Saturday, but was not included so the city might be free to order those tracks torn out and replaced with city-built lines.
>
> "He also said that it would have been impossible to present the ordinance divided into sections in which the construction features were separated from the purchase phase of the plan.

"'It would never pass if so divided,' he explained. 'Some voters who favored the construction of lines by the city might object to a purchase plan, and those who approved purchase might not wish to approve a construction plan.

"The objection to the ordinance which has been made, namely, that it contained no revision (s. c. provision) for the purchase of existing street railway was given careful thought when the measure was drafted,' Mr. Wilcox continued.

"As I recall the language of the charter provision referred to, it means that a contract to purchase a street car 'system' shall be void unless approved by a three-fifths vote.

"It may develop that the city will find it cheaper and more expedient to order the company to remove its tracks from those streets now operated as day to day lines and build the tracks itself.'"——

which verified the allegations of the plaintiff's bill, that there was a marked division of opinion among the electors of the city with reference to the question of construction or purchase, and that the ordinance was so framed and the official communication of the Mayor and statement of financial plan distributed to the electors was intended to convey the impression that only new tracks were to be constructed and the lines with existing tracks were to be purchased, and this was, as stated by the corporation counsel, with a view to securing votes in favor of the proposition of those who were in favor of construction and opposed to purchase, as well as those in favor of purchase and opposed to construction.

The learned Judge disposed of this phase, however, of the plaintiff's case by holding that the official communi-

cation of the Mayor and Common Council submitting the ordinance to it for its consideration and approval, was "unofficial;" that the action of the Street Railway Commission, with the approval of the Common Council, in appropriating tax money and issuing and distributing the sample ballot containing what was called upon the ballot "official information" was "unofficial;" in short, that nothing could be considered by the Court in determining the question of the validity of the ordinance except the original ordinance as adopted by the Common Council.

To approve of such a ruling would be to approve of the most flagrant kind of dishonesty and deception practiced by the Mayor and city officials of the city in order to obtain the approval of their plan which approval they realized could not otherwise be obtained.

REFERRING TO THE THIRD PROPOSITION ABOVE STATED (P. 7):

It is alleged in and by paragraph "6" of plaintiff's bill that the mileage of the lines in Class "A" and Class "B" mentioned in said ordinance is 156.25 miles, and of the Class "C" lines therein is 55.25 miles, being a total of 211.50. That the cost of acquiring the said lines proposed in said ordinance to be acquired would, whatever method of acquisition were adopted, exceed by many millions of dollars the amount of bonds provided for in said ordinance, and would upon the methods and at the estimated costs stated by the Mayor's message, Exhibit 5, exceed the amount of said bonds by nearly four million dollars.

This allegation, like all of the other allegations contained in the plaintiff's bill, is, by the action taken by the

defendant municipality in moving to dismiss the bill, for the purpose of the case admitted to be true, and we contend that under the allegation referred to showing that the cost of the proposed improvement would exceed the appropriation asked for bonds by four million dollars, the entire proceedings are rendered invalid.

It was further alleged in paragraph (9) of the plaintiff's Bill of Complaint as follows:

> "(9) That included in the lines proposed to be acquired in said ordinance, is a line described in paragraph 10 thereof, which runs in part through the City of Highland Park, and another line described in paragraphs 23 and 28 thereof, running in part through the Village of Hamtramck, which city and village are both included within the exterior boundaries of said City of Detroit. That said proposed trackage in the City of Highland Park and in the Village of Hamtramck, particularly that in said City of Highland Park, are important links in the municipal street railway system proposed by said ordinance and essential to the operation and efficiency of the remainder thereof. That over the streets covered by said proposed trackage in Highland Park and Hamtramck there is no existing street railway franchise, and that under the charter of the City of Highland Park, to which plaintiff craves leave to refer with the same force and effect as if the same were herein recited, and under the general laws of the State of Michigan there is no power or valid authority to grant such street railway franchise to the City of Detroit, and therefore no authority under which the right to construct and

operate street railway trackage in either the City of Highland Park or said Village of Hamtramck can be obtained."

With reference to the allegations contained in paragraphs 6 and 9 referred to

See

Beers v. City of Watertown
(Sup. Ct. So. Da.)
177 N. W., 502.

where Mr. Justice Whiting, speaking for the Court, said:

"It stands admitted by the demurrer that, because of the fact that the contract under which the streets of defendant city are now lighted is to soon expire, and because the city needs electric power for its city pumping plant, the defendant council contemplates the immediate construction of an electric system 'for the purpose of lighting the streets . . . . and furnishing power for pumping water;' that the electors voted in favor of issuing the bonds under the belief that the amount authorized was sufficient with which to provide the complete system then contemplated, and that the money derived therefrom would be used to provide a system furnishing electricity for all three purposes, municipal, *industrial* and *domestic;* that the amount of bonds authorized, together with all money available for such purpose, is wholly inadequate with which to provide a system of electric lighting for all three purposes; and that the council are planning to provide a system which will furnish light and power solely for municipal purposes. The question thus presented is whether, when the statute authorizes a council to provide 'any system or part of system of lighting. . .' and it has

asked for bonds with which to provide a complete system for three purposes, it can properly use the money from such bonds to provide a system for but one of the purposes, knowing before it starts to provide such system that it cannot provide the complete system voted for. If it cannot properly do this, and the tax payers would be entitled to have such use of the money restrained, then the issue of bonds should be restrained. . . . .

"It may be that facts exist which would fully justify the council in providing an electric system for municipal purposes only; and it would certainly have full authority under the statute to do so if it had funds properly available for that purpose. It may be that the electors of the city would gladly authorize the issuance of bonds for the purpose of getting such a limited system; but they have not so voted. *The council would have no right to use the funds from the bonds for purposes other than those contemplated by the electors.* To knowingly start in to use these funds when the council knew that they were insufficient to accomplish the contemplated purposes and when the council intended to provide a system radically different than what the electors were led to expect would be as gross a perversion of the funds as to use them for a purpose entirely strange to that for which they were authorized. The facts before us are analogous to those before the court in Tukey v. Omaha, 54 Neb. 370; and in line with the holding in such case we hold that for the council to use the money as its demurrer confesses it intends to would be unlawful and should be restrained. But in the present case the bonds have not been issued. If they should be issued and come into the hands of innocent par-

ties, the rights of the tax payers of defendant city might be jeopardized. It follows that the council should be enjoined from issuing and selling such bonds."

The action of the learned District Judge, in dismissing the plaintiff's bill was not only special and peculiar but was extraordinary in that he for a second time ruled directly in opposition to the express ruling of this Court in the Denver Water Works case, 246 U. S. 178, and the so-called Kronk Ordinance case, 248 U. S., 429.

The action of the learned District Judge was also special and peculiar, as well as extraordinary, in that in dismissing the plaintiff's bill of complaint upon a motion to dismiss, this being substantially a demurrer to the bill for want of equity, it granted defendant affirmative relief without any answer or cross bill or other basis for such relief.

Paragraph 1 of such decree contains the following:

> "That whatever contract rights, privileges and franchises said plaintiff company may have had in the above described streets have expired, *and the defendant city may require said company to cease its service upon such streets * * * and remove its property therefrom upon giving the notice and time for removal, as required under the terms of the decree entered in the case of City of Detroit vs. Detroit United Railway, pursuant to the opinion found in* 172 Mich., p. 136."

The Mayor and Common Council and Street Railway Commission have under the claimed authority of the

ordinance referred to and the approval thereof, as stated, issued approximately $1,750,000 in face value of the bonds claimed to be authorized thereunder and have sold the same to the Board of Sinking Fund Commissioners—a department of the city government composed of the Mayor and City Treasurer and City Controller and the members of the Common Council—and have let contracts that will require the disbursement of practically the entire amount of the proceeds of such bonds.

They have also authorized a further issue of $1,000,000 of such bonds for the purpose and with the intention of making further contracts that will require the expenditure of the proceeds of the sale thereof.

That all of such bonds contain the following recital:

"This bond is one of a series aggregating the sum of Seven Hundred Thousand Dollars ($700,000) issued pursuant to and in conformity with the Constitution and Statutes of Michigan, the Charter of the City of Detroit, and such votes, assents, ordinances, resolutions and proceedings duly adopted and taken, as are required thereby.

"It is hereby certified and recited that all acts, conditions and things precedent to and in the issuance of this bond have been properly done, happened and been performed in regular and due time, form and manner as required by law and that this bond, together with all other indebtedness of the city of Detroit, does not exceed any constitutional, statutory or charter limitation of indebtedness.

The faith and credit of the City of Detroit are hereby pledged for the punctual payment of the principal and interest of this bond."

which would probably render such bonds in the hands of bona fide purchasers binding obligations against the city, notwithstanding the fraudulent action of the municipal authorities taken to procure the authorization of the same.

It therefore becomes vitally important that either this cause be advanced for hearing at an early day or that an injunction be issued by this Court restraining the further disbursement of the proceeds of said bonds, or the further issue of such bonds.

Respectfully submitted,

Elliott G. Stevenson,
Attorney for Plaintiff in Error.

John C. Donnelly,
William L. Carpenter,
P. J. M. Hally,
H. E. Spalding,
Of Counsel.

EXHIBIT "A"

IN THE SUPREME COURT OF THE UNTED STATES.

October Term.

DETROIT UNITED RAILWAY,
a corporation,
Plaintiff in Error,
vs.
CITY OF DETROIT,
a Michigan corporation,
Defendant.
No. 492.

UNITED STATES OF AMERICA,
Eastern District of Michigan,
Southern Division.
ss.

A. D. B. VANZANDT, being duly sworn, says:

That he resides in Birmingham, Michigan, and has been for many years connected in a reportorial and editorial way with newspaper publications in said city.

That he has examined the records of the City controller of the City of Detroit and finds that contracts were let by the Board of Street Railway Commissioners after having been approved by the Common Council, for the purchase of materials and construction of work connected with the proposed municipal street railway system referred to in the plaintiff's Bill of Complaint in the above

entitled cause, and that the amount of such contracts approximates One million eight hundred and seventy-five thousand dollars ($1,875,000).

That in four (4) lots public utility bonds aggregating in amount Seventeen hundred and fifty thousand dollars ($1,750,000) have been sold—$1,650,000 to the Board of Sinking Fund Commissioners of the City of Detroit and $100,000 to the City Treasurer of the City of Detroit—such bonds being claimed to be authorized by the ordinance adopted by the Common Council of the City of Detroit on January 27, 1920, and approved by a vote of the electors of the City on April 5, 1920, with reference to the construction of such municipal street railway system. That three of such lots of bonds were purchased by the Board of Sinking Fund Commissioners in amounts of $200,000, $700,000 and $750,000 ($1,650,000 in all).

That at a meeting of the Board of Street Railway Commissioners held August 20, 1920, a resolution was adopted calling for the issue of One million dollars ($1,000,000) additional of such bonds and it is proposed by said Commission to continue making contracts in connection with the construction of such municipal street railway system that will require the disbursement of the proceeds of the sale of such million dollars ($1,000,000) of additional bonds.

A. D. B. Vanzandt.

Subscribed and sworn to before me this 2d day of October, A. D. 1920.

N. J. Fleming,
Notary Public, Wayne County, Michigan.

My commission expires Feb'y 24, 1923.
(Seal)